89-1721

Supreme Court, U.S.
FILED
APR 20 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. ________

UNITED STATES SUPREME COURT

October Term, 1989

JOHN H. COX,
Petitioner

v.

KEYSTONE CARBON COMPANY,
RICHARD REUSCHER AND
WILLIAM REUSCHER

KEYSTONE CARBON COMPANY,
Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

I. Does the Seventh Amendment right to trial by jury obtain with respect to an action for unlawful discharge arising under §510 of the Employee Retirement Income Security Act (ERISA).

PARTIES TO THIS ACTION

All parties to the proceedings below are listed in the caption of the case.

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John H. Cox vs. Keystone Carbon Company, et al, U. S. District Court for the Western District of Pennsylvania, No. 85 - 160 Erie. Unpublished memorandum opinions and orders are reprinted at the Appendix, *infra*.

STATEMENT OF JURISDICTION

The jurisdiction of the United States Supreme Court to issue a Writ of Certiorari in the within matter is invoked pursuant to 28 U.S.C.S. §1254(1) and 2101(C), this Petition having been filed within ninety days of the judgment of the United States Court of Appeals for the Third Circuit on January 22, 1990.

CONSTITUTIONAL AND STATUTORY PROVISIONS APPLICABLE TO THE CASE

Constitutional Provisions:

(1) Seventh Amendment to the United States Constitution:

> *In suits at common law, where the value in controversy shall exceed Twenty Dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.*

Statutory Provisions:

(1) § 510 of ERISA, [Employee Retirement Income Security Act] Act of September 2, 1974, P. L. 93-406 Title I, Subtitle B, Part 5, § 510, 88 Stat. 895 [29 U.S.C.S. § 1140]:

> *It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising*

any right to which he is entitled under the provisions of an Employee Benefit Plan, this title § 3001 [29 U.S.C.S. § 1201], or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the Plan, this title, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this Act or the Welfare and Pension Plans Disclosure Act. The provisions of § 502 [29 U.S.C.S. § 1132] shall be applicable in the enforcement of this Section.

(2) § 514(a) of ERISA [Employee Retirement Income Security Act] Act of September 2, 1974, P.L. 93-406 Title I, Subtitle B, Part 5 § 514(a), 88 Stat. 897 [29 U.S.C. § 1144(a)]:

Except as provided in Subsection (B) of this Section, the provisions of this Title and Title IV shall supersede any and all state laws insofar as they now or hereafter relate to any employee benefit plan described in Section 4(a) [29 U.S.C.S. § 1003(A)] and not exempt under § 4(b) [29 U.S.C.S. § 1003(b)]. This Section shall take effect on January 1, 1975.

STATEMENT OF CONSTITUTIONAL ISSUE PURSUANT TO SUPREME COURT RULE 28.4(B)

The issue raised in this matter may draw into question the constitutionality of an act of Congress and 28 U.S.C. § 2403(a) may be applicable.

STATEMENT OF THE CASE

John H. Cox (Cox) brought suit against his employer, Keystone Carbon Company (Keystone) and its principal officers alleging that he was discharged from his employment on June 28, 1983 in violation of § 510 of ERISA and claiming that he had sustained various economic injuries for which he sought compensatory damages in the District Court.

The District Court entertained jurisdiction pursuant to 29 U.S.C. § 1132 (e-f) as a matter raising a federal question under the Employee Retirement Income Security Act, 29 U.S.C. § 1101 et seq.

Upon his making demand for same, a jury trial was had, but the role of the jury limited by the District Court to a determination of liability and "special" damages (defined by the trial court as those which accrued from the date of discharge through the date of trial).

At trial, Cox produced evidence demonstrating that he was a highly paid member of senior management of

Keystone who held the position of corporate controller for almost four years at the time of his discharge. Not only did his personnel records contain no adverse review during that period, but he was in each succeeding year of his employment granted the maximum percentage increase in salary permitted by the guidelines established by Keystone's Board of Directors. In March of 1983, at age 50, Cox was diagnosed as suffering from severe coronary artery disease requiring emergency triple by-pass surgery. After three months of an ensuing medical leave of absence, his doctor suggested that he attempt to return to work on a trial basis. Prior to returning, Cox explained to his employer the experimental nature of his proposed return, and his employer offered neither resistance nor warning of its true intention.

On returning to work however he was discharged within an hour of his arrival.

Significantly, the evidence further showed that the employee benefit plan provided that medical and disability coverage terminated as to a discharged employee *unless he were discharged during a period of total disability*, in which case the benefits would continue. Cox argued that his discharge on the very day of his return

evidenced Keystone's specific intent to interfere with his employee benefits.

The jury found Keystone liable and awarded Cox \$250,000.00 in compensatory damages.

On post trial motions however, the trial court reversed itself on the allowance of jury trial, vacated the verdict and granted Keystone's Motion for new, non-jury trial.

By stipulation of the parties the case was then submitted for non-jury disposition by the trial court on the record. The trial court decided in favor of Keystone and Plaintiff appealed to the Third Circuit Court of Appeals. The Third Circuit remanded the matter to the trial court for further determination as to the claimed jury trial right, and the trial court once again concluded that the right did not obtain.

Cox once again appealed, but the Third Circuit Court of Appeals affirmed the judgment of the District Court by Order of January 22, 1990. It is from this Order which Cox now petitions for Writ of Certiorari.

STATEMENT OF BASIS FOR FEDERAL JURISDICTION AS TO UNDERLYING CLAIM

The United States District Court for the Western District of Pennsylvania entertained federal question subject matter jurisdiction in the above-described matter pursuant to 29 U.S.C. § 1132(E-F) and 29 U.S.C. § 1140.

Appellate jurisdiction in the Third Circuit Court of Appeals obtained pursuant to 28 U.S.C. § 1291 as an appeal from a final decision of the United States District Court for the Western District of Pennsylvania entering judgment against Cox and in favor of Keystone on June 1, 1989.

ARGUMENT

The sole question in this case is whether the Seventh Amendment to the Constitution of the United States requires a jury trial upon demand in a cause of action arising under § 510 of the Employee Retirement Income Security Act, Act of September 2, 1974, P. L. 93-406 Title I, Subtitle B, Part 5, § 510, 88 Stat. 895 [29 U.S.C.S. § 1140] (ERISA).

The simplicity of the question involved belies the breadth of its constitutional dimensions. We believe this is so because in denying the right to jury trial in this case the Third Circuit Court of Appeals has so seriously departed from the guiding principles established by this Court as to evidence a lurking threat to the application of those principles well beyond the confines of ERISA.

That the issue not only holds such broad importance, but as well arises in a context of such uncommon clarity as would enable a focused analysis by this Court may best be seen against the backdrop of the two most salient features of this case.

I.

The first of these features is that but for ERISA, which preempts all state laws as to its subject matter, the Petitioner (Cox) would unquestionably have had, under precisely the same facts, a common law cause of action in tort under extant Pennsylvania law.

At bottom, Cox's claim is that notwithstanding he was an at-will employee of Keystone, his discharge by Keystone was unlawful in that it was specifically intended to cause, and did cause, the harm from which the clear mandate of § 510 of ERISA purports to protect him.

Under Pennsylvania common law even an at-will employee such as Cox could recover damages in tort if he could show that he were discharged in violation of some clearly defined mandate of public policy. *Geary vs. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974); *Paul vs. Lankenau Hospital*, _____ Pa. ______; 569 A.2d 346 (1990); *Reuther vs. Fowler & Williams, Inc.*, 255 Pa. Super. 28, 386 A.2d 119 (1978); and *Hunter vs. Port Authority of Allegheny County*, 277 Pa. Super. 4, 419 A.2d 631 (1980).

Moreover, this tort has been specifically recognized as available at Pennsylvania common law by the Third Circuit Court of Appeals. *Novosel vs. Nationwide Insurance Co.*, 721 Fed.2d 894 (1983). See also, *Burns vs. United Parcel Service, Inc.*, CA No. 89-8758, March 21, 1990 (WD PA); 1990 U.S. Dist. Lexis 3257.

Other states similarly recognize as actionable at law the discharge of an at-will employee when the motivation for the firing contravenes public policy. *Jackson vs. Minidoka Irrigation District*, 98 Idaho 330, 563 P.2d 54 (1977); *Sventko vs. Kroger Co.*, 69 Mich. App. 644, 245 NW.2d 151 (1976); *Comment: Protecting Employees At-Will Against Wrongful Discharge: The Public Policy Exception, 96 Harvard Law Review* 1931, 1932 (1983).

ERISA however preempts all such remedies as relates to its subject matter. § 514(a) [29 U.S.C §1144(a)]

Since the subject matter of § 510 specifically proscribes as unlawful the discharge of an employee with the specific intent to deprive him of protected employee benefits, and because this is precisely the basis of Cox's claim, he was relegated to a cause of action under § 510 and could not proceed in common law tort.

Accordingly, were it not otherwise preempted by § 514, Cox would unquestionably have had a legal cause of action in tort for wrongful discharge under Pennsylvania law for which the right of jury trial would be unquestioned.

While this underlying tort requires a claimant to invoke a *clear mandate of public policy* to overcome the strong preference in favor of an at-will employer, and while the statutory proscription of § 510 itself would appear to most pointedly provide it, the case law does not require that this public policy requirement necessarily be founded on a statute. See, *Novosel, supra.*

Notably, Cox had originally included in his complaint a pendent state law count in wrongful discharge invoking the public policy mandates of the *Pennsylvania Human Relations Act*, Act of October 27, 1955, P.L. 744, §1 et seq., as amended, (43 P.S. §951 et seq.) which makes it unlawful for an employer to discharge an employee for reason of non-work related disability.

That count however was, on Keystone's motion, dismissed as preempted by § 510 by virtue of § 514 of ERISA. [1]

Because of this, § 510 cannot properly be characterized as a new right unheard of at common law as to which the application of the Seventh Amendment becomes dependent on the extent to which it is merely analogous to a preexisting common law tort. It rather is, one and the same, the tort of wrongful discharge which it preempts and Congress has in effect codified and preempted a preexisting common law right which indisputably was theretofore triable to a jury.

By contrast, when Congress creates a *new* right not theretofore known at common law, it then becomes necessary to resort to analogy for the purpose of determining the applicability of the Seventh Amendment. *Curtis v. Loether*, 415 U.S. 189, 39 L.Ed. 2d 260 94 S.Ct. 1005 (1974). Unlike the preexisting wrongful discharge tort in the instant case, the statutory right against discrimination in housing considered in *Curtis* had no such established antecedent legal remedy.

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[1] In its memorandum opinion of June 21, 1985 the District Court relied in this connection on *Kelly v. International Business Machines*, 573 F.Supp. 366 (E.D. PA 1983).

Here, the identity between the common law tort of wrongful discharge and the actionable claim under § 510 of ERISA plainly obviates the need of resort to analogy to determine the applicability of the Seventh Amendment.

By its decision in this case however, the Third Circuit Court of Appeals has effectively held that when Congress preempts a preexisting legal cause of action it may, notwithstanding the Seventh Amendment, restrict its enforcement to equity.

Clearly, the power of preemption enjoyed by the Congress under the Commerce and Supremacy Clauses of the Constitution (United States Constitution, Article I, Section 8, Clause 3 and Article VI, Clause 2) does not include the power to violate the clear mandate of the Seventh Amendment that the right of jury trial in suits at common law shall be preserved.

Were it otherwise, Congress, in preempting all theretofore existing rights and remedies embodied in any certain segment of the common law of the various states to which any such legislation might pertain, would have the unfettered power to convert traditional common law rights which were triable to juries to statutory rights

triable to judges alone. It is submitted that this is precisely one of the potential legislative abuses which the Seventh Amendment was designed to check.

Nevertheless, the Third Circuit looked exclusively to congressional intent in disposing of Cox's jury right claim and found, in the absence of affirmative language permitting a legal cause of action, that one did not exist.

Plainly whether or not the Third Circuit was correct in its assessment of Congress' intent to restrict the remedy to equity is not dispositive of Mr. Cox's right to a jury trial unless Congress is permitted, in otherwise lawfully preempting the field, to so restrict the remedy without violating the Seventh Amendment. If it is not so permitted, and this is the gravamen of Petitioner's argument, then even the clearest congressional intent to so restrict the remedy will be unavailing.

Notwithstanding this, argument submitted on this issue was twice rejected by the Court of Appeals. [Appendix, page A-10 and A-23]. Instead, and illustrating rather pointedly the need for guidance by this Court, the Court of Appeals appears to have relied heavily on this Court's decision in *Massachusetts Mutual Life Insurance*

Co. vs. Russell, 743 U.S. 134; 87 L.Ed. 2d 96; 105 S.Ct. 3085 (1985). [Appendix, page A-24]

Clearly, *Massachusetts Life* involved no question concerning the Seventh Amendment. It was there neither raised by the parties nor considered by this Court. The sole question presented was whether § 409(A) of ERISA permitted the *chancellor* to award "extra-contractual damages". This Court found that at least with respect to § 409(A) Congress had manifest in the "...six carefully integrated civil enforcement provisions found in § 502(A) of the statute..." a clear intention not to permit recovery of extra-contractual damages.[2] Speaking through Justice Stevens the Court expressed reluctance to,

> *..."fine-tune" an enforcement scheme crafted with such evident care as the one in ERISA. As we stated in Transamerica Mortgage Advisors, Inc. vs. Lewis, 444 U.S. 11, 19 (1979): "[W]here a statue expressly provides a particular remedy or remedies, a Court must be chary of reading others into it". id*, at 147.

While the pronouncement of this Court in *Massachusetts Mutual Life* may be instructive as to the

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[2] This Court expressly noted that "because respondent relies entirely on § 409(A)...we have no occasion to consider whether any other provision of ERISA authorizes recovery of extra contractual damages. *Massachusetts Mutual Life* at Footnote 5.

considerations which courts must use in determining congressional intent in cases where the Seventh Amendment right is actually and affirmatively raised, such an inquiry is not dispositive unless Congress is found thereby to have permitted trial by jury. *Tull vs. United States*, 481 U.S. 412; 107 S.Ct. 1831; 95 L.Ed.2d 365 (1987).

Speaking through Justice Brennan this Court in *Tull*, supra, at note 3, reiterated the long established principle that:

> *Before initiating the inquiry into the applicability of the Seventh Amendment...this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided.*

Accordingly where congressional intent is found to permit jury trials, the need for further constitutional inquiry is obviated.

Where however congressional intent is plainly to the contrary or is otherwise ambiguous, resort must be had to the Seventh Amendment principles established by this Court. Where those principles are found to apply, even any arguable congressional intent to the contrary must be

displaced by the force of the Constitution. *Curtis vs. Loether*, supra.

In *Curtis* a claimant had brought an action for compensatory and punitive damages alleging a violation of § 804(A) of the Civil Rights Act of 1968. That section prohibited discrimination in housing by reason of race. This Court found the legislative history sparse and in any event ambiguous. Notwithstanding extensive argument from each side of the case with respect to congressional intent, this Court concluded the exercise to be unavailing saying:

> *We see no point to giving extended consideration to these arguments...for we think it is clear that the Seventh Amendment entitles either party to demand a jury trial...[since] when Congress provides for enforcement of a statutory right in an ordinary civil action in the District Courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be available...*

Even if the Third Circuit's reliance on *Massachusetts Mutual Life* in concluding that Congress did not intend other than equitable relief for a violation of § 510 of ERISA was appropriate for that purpose, its failure to determine whether, notwithstanding this, the Seventh

Amendment nevertheless applies points up the urgent need for further guidance by this Court.

That need is two-fold. First, and notwithstanding Cox's ultimate right to jury trial, this case points dramatically to the need for this Court to distinguish more vigorously between the tools of constitutional analysis which it sanctions, and the underlying constitutional principles themselves. In this connection the Third Circuit quite obviously allowed the "tool" of inquiry into congressional intent to supplant the central guiding principle of the Seventh Amendment itself.

Second, that but for the adoption of ERISA Cox would indisputably have had a legal cause of action for money damages at common law so singularly invokes the heart of that central guiding principle, illustrates the danger that so technical a preoccupation by our courts poses to this treasured constitutional guarantee.

Bearing in mind that the right embodied in § 510 of ERISA is not a *new* right created by Congress, but rather the codification and preemption of a preexisting common law right actionable at law, we do not mean to here necessarily suggest that where Congress does create a new

right it may not in the proper case restrict its remedy to equity notwithstanding the Seventh Amendment.

Indeed, this Court in *Curtis vs. Loether, supra.*, left this possibility open. Referring to the contrast between Title VIII and Title VII cases in this respect, this Court observed that the remedial provisions of Title VII which rather clearly delimited remedy to equity, contrasted sharply with Title VIII's direct authorization of an action for actual damages. Noting that such distinction may be instructive, this Court there however expressly declined to hold that such a distinction was necessarily dispositive saying:

> *...we of course express no view on a jury trial issue in that context.*

Only one year after deciding *Curtis* this Court considered an appeal under Title VII, but as in *Massachusetts Mutual Life*, the Seventh Amendment issue was again only conspicuous by its absence. *Albemarle Paper Co. vs. Moody*, 422 U.S. 405; 45 L.Ed.2d 280; 95 S.Ct. 2362 (1975).

In *Albemarle* the question presented was as to what standard the trial court, *sitting in equity*, should apply in determining whether or not to consider the award of

monetary damages in the nature of back pay incident to an action for reinstatement. The right to jury trial was not in issue. Hence the case turned upon this Court's analysis of equitable principles in light of the statutory language which created the reinstatement remedy.

While the holding therefore in no measure turned upon Seventh Amendment principles, the concurring opinion of then Justice Renquist suggests that even if the Seventh Amendment had been raised, unless the Court were prepared to characterize back pay incident to reinstatement as legal damages, even the introduction of the constitutional issue would be unavailing.

> *...precisely to the extent that an award of back pay is thought to flow as a matter of course from a finding of wrong doing, and thereby becomes virtually indistinguishable from an award for damages, the question (not raised by any of the parties, and therefore quite properly not discussed in the court's opinion), of whether either side may demand a jury trial under the Seventh Amendment becomes critical.*

Notwithstanding that the issue left open in *Curtis* is not yet resolved by this Court, its resolution would have no relevance here.

While Cox originally sought reinstatement in addition to compensatory damages, his claim for reinstatement was abandoned and the cause tried to the jury as a claim under § 510 for compensatory damages in no different a fashion than, but for its preemption, his underlying state tort action would have been tried.

Beyond this, and as pointed out above, the statutory right against discrimination in housing considered in *Curtis*, unlike § 510 of ERISA, had no remedial antecedent at common law. On the contrary, the clear impetus for the creation of such right by Congress was precisely the failure of traditional common law in the various states to afford any remedy at all. Here, by contrast, a legal action in tort for wrongful discharge preexisted ERISA.

Accordingly, whether or not in the case of the creation of a *new* right by Congress this Court would now be inclined in the proper case to hold that the application of the Seventh Amendment depends upon the inclusion in the statute of an express right of action for damages is of no moment here precisely because § 510 is not a new right as to which Congress in fashioning a remedy could be accorded such latitude.

The failure of the Third Circuit Court of Appeals to recognize the resulting infringement of the Seventh Amendment is accordingly not only error which requires reversal for the benefit of Mr. Cox, but is error which demonstrates a broader and more serious misapplication of the constitutional principles established by this Court.

For this reason alone, this Court should grant Certiorari.

II.

The second striking feature of this case which invites the solemn attention of this Court is the fact that after a jury found in favor of Mr. Cox, the trial judge on the very same record [3] came to an opposite conclusion.

This presents a rare and unobstructed view into the very heart of the Seventh Amendment guarantee which vividly illustrates both the substantive impact and the philosophical importance of that first principle of our jurisprudence.

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[3] Notwithstanding that Keystone's Motion for new trial was granted, the parties by stipulation submitted the case for disposition by the Judge on the record established before the jury.

The primary function of any jurisprudence is to resolve dispute and no system can function without first institutionalizing a standard mode of ascertaining truth with impunity. In doing so however it must come to grips with the elusive nature of truth and the impossibility of absolute certainty. It is this dilemma which compels the need to settle upon a standard fact finding process which not only avails the most reasonable approach to truth, but in light of its impossible task, one which will as well engender a broad consensus of such quality as enables the most skeptical among us to abide its findings.

So natural a solution to this dilemma is the mechanism of trial by jury that it has attained essentially universal acceptance in civilized societies of otherwise vastly diverse ideologies.

> *The right of trial by jury is of ancient origin, characterized by Blackstone as "the glory of the english law" and "the most transcendent privilege which any subject can enjoy"...; and, as Justice Story said, "...the constitution would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms." With perhaps some exceptions, trial by jury has always been, and still is, generally regarded as the normal and preferable mode of disposing of issues of fact in civil cases at law as well as in criminal cases.*

Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. Dimick vs. Scheidt, 293 U.S. 474, 486; 79 L.Ed. 603; 55 S.Ct. 296 (1935); See also *Beacon Theaters, Inc. vs. Westover*, 359 U.S. 500; 3 L.Ed.2d 988; 79 S.Ct. 948 (1958).

This first principle of jurisprudence, like the first principle of any philosophical endeavor, gives way once adopted to the more substantive task of establishing particular rules of application. Since its adoption in 1791, this Court has risen to the task of adopting such rules in the case of the Seventh Amendment in more than ninety-five cases. See, *Supreme Court's Construction of Seventh Amendment's Guarantee of Right to Trial by Jury*, 40 L.Ed.2d 846 (1986).

It has however rarely had such clear an opportunity to confirm this first principle in a context where, as here, the conflict between bench and jury result is not simply an academic potential, but is real and actually dispositive.

Positing as it does diametrically opposite findings, this case provides a uniquely real illustration of the dilemma which the Seventh Amendment jury trial preference purports to avoid.

In truth, the principles of jurisprudence underlying the Seventh Amendment fully well recognize that the findings of twelve are no less infallible than the findings of one. That it is in this sense imperfect and from time to time gives rise to obvious aberrations in result tends to fuel a certain cynicism, particularly among the trial bar and bench alike, as to its wisdom.

The wisdom of its preference is not however necessarily founded on the notion that truth is better ascertained by twelve [4], but rather found in the expression of a preference itself.

Notwithstanding that such cynicism is accordingly misplaced, and notwithstanding that this Court has quite properly never entertained it as the basis of curtailing the application of the Seventh Amendment [5], it lurks

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[4] The intrinsic problem of aberrant jury result is of course the subject of a great body of common law to which the Seventh Amendment itself refers in providing that "*...no facts tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.*"

[5] Whatever the merits of such cynicism, the issue which it poses is beyond the proper cognizance of our judiciary precisely because it calls into question not the construction of the Seventh Amendment, but its underlying wisdom. Such a question is reserved to the arena of constitutional amendment, not constitutional construction.

subliminally as an erosive threat to this constitutional guaranty.

There is a paradox here. It is that the very existence of our legal system ultimately depends upon the ability of its officials to apply what they know to be arguably imperfect first principles with the unwavering impunity that would otherwise only spring from absolute certainty.

> *"There are therefore two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand those rules of behavior which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behavior by its officials. The first condition is the only one which private citizens need satisfy... The second condition must also be satisfied by the officials of the system. They must regard these as common standards of official behavior and appraise critically their own and each other's deviations as lapses. [H.L.A. Hart, The Concept of Law, p. 113 (Oxford University Press, 4th ed. 1967)]*

While the instant case does not require this Court to address either the principles of jurisprudence on

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which the Seventh Amendment is based, or the underlying professional cynicism which indirectly challenges it, we could not conclude this Petition without some allusion to those issues in light of the very unique posture of this case.

As it is, and as first argued above, this case so clearly falls within the established substantive rules of constitutional interpretation which this Court has already long since drawn from those first principles that resort to them for Mr. Cox is quite unnecessary.

Because however the extent of the lapse in adherence to those long established rules may itself demonstrate to this Court a burgeoning need to more broadly reconfirm the principles of jurisprudence on which the Seventh Amendment is based, we have touched upon them here.

III.

Finally, and beyond the intrinsic worthiness of this case for review by this Court, there is the fact that this Court has already issued a Writ of Certiorari in the case

of *Ingersoll Rand Co. vs. McClendon*, No. 89 - 1298, on April 16, 1990.

McClendon similarly involves a claim of wrongful discharge, but unlike Petitioner here, the claimant has pursued his remedy under the pre-existing state law tort in the state courts of Texas. The Texas high court ruled that notwithstanding that the "public policy" invoked by the claimant was ERISA's prohibition against interference with employee benefits, the claim was not preempted and could be pursued in an action for damages in the state courts.

To the extent that this Court overrules the Texas high court, the very Seventh Amendment issue raised in this case becomes a critical corollary to the ultimate disposition of both cases.

In that respect, the instant petition of John Cox presents this Court with an ideal vehicle through which to fully address and resolve whether, if preempted, a wrongful discharge claim is one at law entitled to trial by jury - an issue which is an inescapable corollary of, but does not yet appear ripe for adjudication in *McClendon*.

As such, this case presents itself as an ideal potential companion case to that of *McClendon*.

For all of the foregoing reasons, this Court should grant the instant Petition for Writ of Certiorari.

Respectfully submitted,
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APPENDIX

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Filed January 31, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 89-3404

JOHN H. COX,
Appellant

v.

KEYSTONE CARBON COMPANY,
RICHARD REUSCHER and WILLIAM REUSCHER

Keystone Carbon Company,
Appellee

On Appeal from the United States District Court for the Western District of Pennsylvania (Erie)
(D.C. Civil No. 85-00160 E)

Submitted Under Third Circuit Rule 12(6)
January 22, 1990

Before: SLOVITER, HUTCHINSON, and COWEN, Circuit Judges

(Filed January 31, 1990)

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OPINION OF THE COURT

SLOVITER, Circuit Judge

This is the second time plaintiff's ERISA claim is before us on appeal. On the first appeal, we affirmed the district court's order denying plaintiff a jury trial on his claim under section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), and directing a verdict in favor of defendant on plaintiff's claim of intentional infliction of emotional distress. We remanded so that the district court could consider further plaintiff's entitlement to relief and to a jury trial under ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). The district court, relying on subsequent authority of this court, determined that plaintiff's claim seeking benefits under that section did not give rise to a

right to a jury, and reaffirmed its earlier order granting summary judgment to defendant. Plaintiff appeals.

I.

FACTS AND PROCEDURAL HISTORY

Plaintiff John Cox began working for defendant Keystone Carbon Company in 1979, and continued as its comptroller until his termination on June 28, 1983. On March 28, 1983, plaintiff took a leave of absence to undergo triple bypass surgery.

He returned to work on a trial, temporary, part-time basis on June 28, 1983 and was discharged upon his return. After his termination, Cox applied for long-term disability and medical insurance benefits from the third party insurance carrier with whom Keystone carried insurance. Ultimately, although Keystone opposed Cox's application, Cox was granted disability benefits but was denied medical insurance. At the time of trial, he had been unsuccessful in his attempt to procure medical and life insurance and to find alternative employment.

Cox filed a five count complaint against Keystone and its president and ice president, Richard Reuscher and William Reuscher respectively. On this appeal, the only count remaining is Count I, alleging that Keystone violated section 510 of ERISA, 29 U.S.C. § 1140, by discharging him in order to interfere with his attainment of employee benefits. THe matter was originally tried before a jury because the district court had denied Keystone's motion to strike Cox's demand for a jury trial on his ERISA claim. Following the jury's return of a verdict in favor of Cox for $250,000, the court granted Keystone's motion for a new trial, ruling that Cox was not entitled to a jury trial on the ERISA claim. By stipulation of the parties, the prior record was submitted to the court for determination of the ERISA claim. The district court entered judgment in favor of Keystone.

On appeal, this court in *Cox v. Keystone Carbon Co. (Cox I)*, 861 F.2d 390 (3d Cir. 1988), rejected Cox's argument that section 510 of ERISA itself created a legal

right to recovery for which the Seventh Amendment commands a jury trial. We stated that the procedural and remedial sections of a statute, in this case section 502 of ERISA, 29 U.S.C. § 1132, must be examined to determine if a jury trial must be afforded. We also rejected the contention advanced by Cox that courts are free to create remedies outside the six provisions contained in section 502(a).

In *Cox I*, we held that subsection 502(a)(3), which provides that a civil action may be brought by, *inter alia*, a beneficiary to enjoin any act or practice which violates the Act of a plan "or to obtain other equitable relief," was meant to provide only equitable relief. Thus, the district court had not erred in denying Cox a jury trial based on that section. We remanded the case to the district court to allow it to determine in the first instance whether Cox stated a claim for relief under section 502(a)(1)(B), whether that claim was legal or equitable in nature, and whether Cox had a right to a jury trial thereon.

On remand, the district court rejected Keystone's contention that Cox had not presented a claim under section 502(a)(1)(B), construing Cox's complaint as one seeking benefits due him under Keystone's various employee benefit plans. Nonetheless, it held that when analyzed under Third Circuit law, the claim for benefits was equitable in nature and that therefore Cox had no right to a jury trial. The court adhered to its earlier judgment for the defendant. Cox appeals.

II.

Right to a Jury Trial under ERISA

Cox's substantive ERISA claim is based on section 510 of ERISA which prevents interference with rights protected under that Act.[6] Section 502(a)(1)(B) provides:

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[6]. The section reads, in pertinent part:

> It shall be unlawful for any person to discharge . . . a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan [or] this subchapter . . . or for the purpose of interfering with the attainment of any right to which such participant may

A civil action may be brought--

(1) by a participant or beneficiary--

. . . .

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

29 U.S.C. § 1132(a)(1)(B) (1982).

Cox's claim that the Seventh Amendment entitles him to a jury trial has been dealt a fatal blow by earlier decisions of this court. In *Turner v. CF&I Steel Corp.*, 770 F.2d 43 (3d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986), we held that employees who sued under ERISA to receive benefits under an applicable plan were not entitled to a jury trial under section 502(a)(1)(B). Thereafter, in *Pane v. RCA Corp.*, 868 F.2d 631 (3d Cir. 1989), we considered whether an employee who sued the

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become entitled under the plan [or] this subchapter . . . The provisions of section 1132 [section 502] of this title shall be applicable in the enforcement of this section.

29 U.S.C. § 1140 (1982) [section 510 of the act].

employer for severance benefits granted to other employees was entitled to a jury trial for his ERISA claim. We relied on our opinion in *Turner* to hold that section 502(A)(1)(B) claim for benefits was equitable in nature, and that hence plaintiff was not entitled to a jury trial. *Id.* at 636. Cox argues that *Pane* was wrongly decided. All panels of this court are bound to the holding. *See* Third Circuit Internal Operating Procedures 8.C.

Cox seeks to distinguish *Pane* by arguing that his section 502(a)(1)(B) claim is not one for "benefits" under the first clause of section 502(a)(1)(B), "to recover *benefits* due to him under the terms of the plan," which was the basis of the *Pane* claim. He argues that in contrast his claim falls under the second clause of section 502(a)(1)(B), "to enforce his *rights* under the terms of the plan." He contends that the rights referred to under this clause are rights other than rights to benefits, and that the substantive right he wishes to enforce is the right to be

free from tortious interference guaranteed by section 510, which is a legal claim. Finally, he argues that because it is not feasible to reinstate him to his prior position, his claim for compensatory damages must be tried before a jury.

We agree with Keystone that the statutory language of section 502(a)(1)(B) itself requires rejection of Cox's argument. The clause on which he relies gives a claimant only action "to enforce his rights *under the terms of the plan.*" § 502(a)(1)(B) (emphasis added). Cox is simply wrong in arguing that unless the second clause of section 502(a)(1)(B) is the enforcement mechanism for section 510, it would be duplicative of the first clause. There are "rights" which can be granted under a plan separate and distinct from the recovery of benefits awarded thereunder. For example, a plan must incorporate an appeal process for participants and beneficiaries. *See, e.g.*, 29 U.S.C. § 1133. A suit to enforce that right fits within the second clause of section 502(a)(1)(B), *see, e. g., Blau v. Del Monte*

Corp., 748 F.2d 1348 (9th Cir.), *cert. denied*, 474 U.S. 865 (1985), and is patently equitable in nature. Thus, to the extent that Cox's claim is, as construed by the district court, one for benefits under the plan, we agree with the district court that *Pane* governs, and that Cox was not entitled to a jury trial. To the extent that Cox seeks compensatory damages for tortious interference, that claim does not fall within section 502(a)(1)(B).

Finally, Cox's argument that Congress created a legal right when it created section 510 to which the right to a jury trial attaches has already been rejected by this court once and we adhere to the well reasoned conclusion set forth in *Cox I*, 861 F.2d at 392-94. *See also Pane*, 868 F.2d at 637 (no reason to assume that Congress intended section 510 to have a legal remedy, contrary to the explicit intention to allow equitable remedies in section 502(a)).

III.

The Merits of Cox's ERISA Claim

Cox also contends that on the merits the district court erred in granting judgment in favor of Keystone. The standard of review is whether the district court decision was clearly erroneous. *See* Fed.R.Civ.P. 52(a). In applying that standard, an appellate court may not substitute its findings for that of the district court; it may only make an assessment of whether there is enough evidence to support such findings. *Cooper v. Tard*, 855 F.2d 125, 126 (3d. Cir. 1988).

In order to prove that Keystone tortiously interfered with Cox's attainment of benefits (in particular, medical and disability benefits) and consequently violated section 510 of ERISA, Cox had to show tat the fact he would receive benefits played a role in Reuscher's decision to terminate him on the day that he returned to work. Under the medical and disability insurance policies that covered Keystone employees, an employee is entitled to benefits if the employee is "unable to work because of disability" at the time of discharge. App. at 136. Under

Cox's theory, Reuscher in order to avoid the cost to the company of an increase in insurance premiums, waited to terminate Cox until he returned to work when he would not be considered to fit within the policies' coverage.

Reuscher, Keystone's president, testified that Cox was fired because of his deficiencies in the job, that this decision was discussed with the company's independent accountant, that they postponed the discharge during the IRS' audit of Keystone, and that during that audit Cox became ill. App. at 50. Reuscher testified that he did not like to terminate employees over the phone, and this was why he waited to discharge Cox until he returned. He also testified that he had held several meetings with Cox and that Cox was aware of the general dissatisfaction with his job performance long before his illness.

J. Stalder from Price Waterhouse corroborated Reuscher's testimony and testified that Reuscher spoke to him about his dissatisfaction with Cox's job performance before Cox's illness. Supp.App. at 81-82. Keystone also

presented testimony that showed that its insurance premiums do not change if employees are terminated as disabled, Supp.App. at 92, that its medical insurance premium was based on estimates and that the illness of one person would not lead to an increase in its premium, *id*, at 8999-91, and that under Keystone's pension plan, Keystone would not save money be terminating an employee because the plan incorporated an assumption of employee turnover, *id*. at 87-89.

The district court found that Reuscher's testimony was credible and convincing, that Keystone was dissatisfied with Cox's performance, and that "this alone was the basis for the decision to terminate" Cox. App. at 55. The court concluded that Cox's termination did not violate ERISA.

Cox points to evidence which suggest a contrary result. We, however, are not the primary factfinder and therefore even if we would have decided the factual issue differently on the basis of the record before us, we cannot

conclude that the district court's factual findings are clearly erroneous.

IV.

Conclusion

For the foregoing reasons, we will affirm the judgment of the district court.

A True Copy:

Teste:

Clerk of the United States Court
of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 88-3163

JOHN H. COX,

Appellant

v.

KEYSTONE CARBON COMPANY,
RICHARD REUSCHER and WILLIAM REUSCHER

On Appeal from the United States District
Court for the Western District
of Pennsylvania

D.C. Civil No. 85-160

Argued July 27, 1988

BEFORE: GIBBONS, Chief Judge,
SEITZ and HUTCHINSON, Circuit Judges

(Filed November 9, 1988)

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OPINION OF THE COURT

SEITZ, Circuit Judge.

John H. Cox ("Cox" or "plaintiff") appeals from a final judgment of the district court dismissing his ERISA and state law claims. We have jurisdiction under 28 U.S.C. § 1291.

I. BACKGROUND

On November 5, 1979, Cox was hired by Keystone Carbon Company ("Keystone") to serve as its corporate controller at a starting salary of $40,000 per year. On March 28, 1983, after experiencing chest pains and undergoing a stress test, Cox was diagnosed as suffering from severe coronary artery disease. He thereafter

commenced a leave of absence to have triple bypass surgery.

On June 28, 1983, Cox returned to work on a part-time trial basis. On that day, Cox was discharged by Richard Reuscher, Keystone's President. [7] After his termination, Cox applied for long term disability and medical insurance benefits. [8] Keystone opposed Cox's application for these benefits. Ultimately, Cox was denied medical insurance but was granted disability benefits.

On June 21, 1985, Cox filed a five count complaint against Keystone, Richard Reuscher and William

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[7] At the time of Cox's dismissal, Richard Reuscher was Secretary-Treasurer of Keystone.

[8] The medical and disability insurance was purchased by Keystone from a private insurance carrier. Cox applied to this third-party insurance carrier for his medical and disability benefits.

Reuscher.[9] Thereafter, the district court dismissed three counts, leaving Keystone as the only defendant and leaving only Counts I and III for trial. Those are the only counts involved in the appeal. Count I alleged that Keystone, in violation of § 510 of ERISA, discharged Cox for the purpose of interfering with Cox's attainment of certain employee benefits. Count III alleged that the reason for and the manner of discharging Cox was intentional, malicious, wanton, extreme and so outrageous as to constitute intentional infliction of emotional distress under Pennsylvania law.

Prior to the trial on the merits, Keystone moved to strike Cox's demand for a jury trial as to the ERISA claim. The district court permitted the ERISA claim to be tried to a jury but limited the jury determination to liability and special damages. Special damages were defined as lost pay from the date of discharge to the date

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[9] William Reuscher is the vice president of Keystone.

of judgment and out-of-pocket medical expenses incurred to the date of judgment. The district court reserved to itself the prerogative to assess general damages, defined as diminished earning capacity and pain and suffering, and to reinstate pension, medical and life insurance benefits.

At the close of plaintiff's evidence in the jury trial, the court granted Keystone's motion for a directed verdict on plaintiff's claim based on intentional infliction of emotional distress. Thereafter, the jury returned a verdict of $250,000 in favor of Cox on his ERISA claim. The court, however, denied Cox general damages and refused to reinstate his pension, medical or life insurance benefits.

Both parties filed post-trial motions. Cox filed a motion under Rule 52(b) of the Federal Rules of Civil Procedure seeking additional findings and an amendment to the judgment. Keystone filed a motion for a new trial and in the alternative for a judgment notwithstanding the verdict. The district court ruled that it erred in granting

Cox a jury trial on the ERISA claim. It therefore vacated the jury verdict and granted Keystone's motion for a new trial. All other post-trial motions were declared moot.

The parties subsequently filed a stipulation waiving their right to further evidentiary proceedings and submitted the evidence from the jury trial as the record for the determination of the ERISA claim by the district court. Thereafter the district court entered judgment in favor of Keystone on the ERISA claim and this appeal followed. We first address plaintiff's ERISA claim.

II. THE STATUTORY SCHEME

Plaintiff brought his suit under § 510 of ERISA which provides in pertinent part:

> It shall be unlawful for any person to discharge . . . a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter or the Welfare and Pension Plans Disclosure Act . . . The provisions of § 1132 of this title shall be applicable in the enforcement of this section.

Congress enacted § 510 to prevent unscrupulous employers from discharging or harassing their employees

in order to keep them from obtaining rights to which they had become entitled under their benefits plan or under ERISA, *Gavalik v. Continental Can Co.*, 812 F.2d 834, 851 (3d Cir.) *cert. denied* 108 S.Ct. 495 (1987).

To enforce the prohibitions of § 510, Congress made the civil enforcement scheme of section 502, 29 U.S.C. § 1132, applicable. Under subsection (a)(1)(B) a civil action may be brought by a participant or beneficiary "to recover benefits due to him under the terms of his plan, to enforce his right under the terms of the plan, or to clarify his rights for future benefits under the terms of the plan." Under subsection (a)(3) a civil action may be brought "by a participant, beneficiary or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other equitable relief."

III. RIGHT TO A JURY TRIAL UNDER ERISA

Appellant contends that the district court erred in finding that Cox was not entitled to a jury trial on his

ERISA claim and granting Keystone's post-trial motion for a bench trial. First, Cox contends that § 510 created a legal right to recovery, and that once Congress created a private right of action to enforce this legal right then the seventh amendment to the Constitution commands that a jury trial must be afforded to any party seeking to recover for a violation of § 510.

Cox's analysis is flawed. In determining a party's right to a jury trial it is the procedural and remedial sections of the statute creating the right which must be examined. *See Tull v. United States*, 481 U.S. 412, 107 S.Ct 1831 (1987); *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). Where the particular remedial section in the statute provides for only equitable remedies then no right to a jury trial exists. *Lincoln v. Board of Regents of University System of Georgia*, 697 F.2d 928, 934 (11th Cir.) *cert. denied*, 464 U.S. 826 (1983) *citing Lehman v. Nakshian*, 453 U.S. 156, 163-164 (1981). As one learned commentator has pointed out, within a particular statute

a right to a jury might exist as to some of the enforcement section and not as to others.[10] 5 J. Moore, *Federal Practice*, § 38-11[7] (1988). Rather than examining whether § 510 afforded a legal right to relief, the applicable subsections of § 502, the civil enforcement provision, must be examined.

Second, Cox asserts that once Congress create a right pursuant to § 510, Congress was without power to restrict the remedies available to Cox. Instead, Cox claims, it is entirely up to the court to fashion appropriate remedies, including legal remedies which would entitle Cox to a jury trial.

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[10] Moore notes: "Under the [Price Control] Act, Congress provided an arsenal of civil remedies: (1) an action for damages for the aggrieved purchaser or tenant; (2) an action by the Administrator to enjoin continued violations and restitution of the overcharges to the purchaser or tenant, in the event he has not sued; and (3) an action by the United States to recover treble the amount of overcharge under certain circumstances. The second remedy is equitable and no right to a jury trial attaches. The first and third are legal and the right to a jury trial attaches, although the statute is silent on the matter." 5 J. Moore § 38-11[7] (1988).

This proposition is meritless. The Supreme Court explicitly rejected the notion that courts are free to create remedies outside the scope of the "six carefully integrated civil enforcement provisions found in § 502(a)" of ERISA. *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 146 (1985). The Supreme Court noted: "Where a statute expressly provides a particular remedy or remedies, a court must be chary about reading others into it." *Id.* at 147 citing *Transamerica Mortgage Advisor, Inc. v. Lewis*, 444 U.S. 11, 19 (1979). Thus, we are not free to create remedies which Congress created under § 502(a)(1)(B) and § 502(a)(3), the applicable remedial sections in this case, are of such a nature as to afford a right to a jury.

In analyzing Cox's entitlement to a jury trial under § 502(a)(1)(B) and § 502(a)(3), this court must first examine the language and the legislative history of ERISa to determine if Congress intended to create a right to a jury trial. *Lorillard v. Pons*, 434 U.S. at 584. If the

statutory analysis does not reveal a congressional intent to provide a jury trial, the seventh amendment to the United States Constitution must be examined to determine if it commands that a jury trial be provided. *See Curtis v. Loether*, 415 U.S. 189 (1974). We will deal with Cox's entitlement to a jury trial under each of the claimed subsections in turn.

A. SECTION 502(a)(3)

The appropriate starting point for our analysis is with the language of ERISA. [11] "ERISA itself does not make any provision for a jury trial, and the sparse legislative history is not enlightening." *Turner v. CF&I Steel Corp.*, 770 F.2d 43, 46 (3d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986). Thus, the language of subsection (a)(3), as the remedial provision here in question, must

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[11] As the Supreme Court has noted: "It is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided." *Lorillard v. Pons*, 434 U.S. at 575 (quoting *United States v. Thirty-seven Photographs*, 402 U.S. 363, 369 (1971)).

be examined in order to divine Congress' intent. *Covington v. International Rehabilitation Assoc.*, No. 86-3503 slip op. at 2 (E.D. Pa. October 16, 1986).

A close examination of the language of subsection (a)(3) reveals that it is meant to provide only equitable relief and as such Congress can be said to have intended that there be no right to a jury trial under subsection (a)(3). *See Great American Savings and Loan Assoc. v. Novotny*, 442 U.S. 366, 375 (1979). Subsection (a)(3) provides that a civil action may be brought "to enjoin any act or practice . . . or to obtain *other equitable relief*." 29 U.S.C. § 1332(a)(3) (emphasis added). In using the words "equitable relief", we can infer that Congress knew the significance of the terms equitable and intended that no

jury be available on demand. [12] *Lorillard v. Pons*, 434 U.S. at 583.

Our analysis does not end here; we must determine if the seventh amendment dictates that a jury trial be provided on demand. That amendment provides that, "[i]n Suits at common law, where the value in controversy exceed twenty dollars, the right to a trial by jury shall be preserved." "The phrase 'common law', is found in this clause, is used in contradistinction to equity and admiralty and maritime jurisprudence . . ." *Parsons v. Bedford*, 3 Pet. 433, 446-447 (1830). As the Supreme Court noted in *Curtis v. Loether*, 415 U.S. at 194: "The Seventh

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[12] Appellant, at oral argument, drew this Court's attention to the Seventh Circuit case of *Bugher v. Feightner*, 722 F.2d 1356 (1983), *cert. denied* 469 U.S. 822 (1984). Although the Seventh Circuit in *Bugher* determined that the plaintiff was entitled to a jury, the Court was confronted with a different situation than the one at hand. In that case, the plaintiff was seeking relief under both § 502(a)(3) of ERISA and § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185(a). The court noted that if § 502(a)(3) were the only grounds for the suit "we would have no difficulty in holding that there is no right to a jury trial in this case." *Bugher*, therefore, does not effect this court's disposition of this case.

Amendment does not apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." Thus, where, as is the case under subsection (a)(3), the remedy is explicitly equitable, then there is no seventh amendment right to a jury. *Curtis v. Loether*, 415 U.S. at 194-195. *See Tull v. United States*, 481 U.S. at ______, 107 S.Ct. at 1837.

B. SECTION 502(a)(1)(B)

Even though Cox is not entitled to a jury trial under § 502(a)(3), our analysis is not over because he may still be entitled to a jury trial if his claim for relief under § 502(a)(1)(B) is legal in nature. From the record before us, we cannot find that the district court addressed plaintiff's right to relief under this subsection or his right to a jury thereunder. From our examination of post-argument submissions to us, it would appear that plaintiff relied on § 502(a)(1)(B) in the district court, although

Keystone seems to argue to the contrary. Furthermore, Keystone did not address this issue in its brief filed in this court.

Under the foregoing circumstances, we must consider whether we should remand this portion of plaintiff's claim to afford the district court the first opportunity to resolve it. It is established law in this circuit that the substance of the pleadings must be examined to determine if the issues raised are triable to a jury. Laskaris v. Thornburgh, 733 F.2d 260, 264 (3d Cir.) cert. denied, 469 U.S. 886 (1984). As this court previously recognized "[t]he difference between actions brought under subsections (a)(1)(B) and (a)(3) of ERISA is often difficult to discern in situations such as this one where the complaint is unspecific." Livolsi v. Ram Construction Co., 728 F.2d 600, 602 (3d Cir. 1983). Since Cox's complaint did not specify under which subsection of § 502 of ERISA his action was brought, it seems appropriate for the district court to first determine whether the §

502(a)(1)(B) claim was presented to it and if so, whether he was entitled to a jury trial thereunder.

IV. THE MERITS OF COX'S ERISA CLAIM

Cox contends that even if we find that he was not entitled to a jury trial, the district court's judgment in favor of Keystone should be overturned. Given our resolution of Cox's right to a jury trial, this question is not now properly before this court. On remand, the district court must determine if Cox is entitled to relief pursuant to § 502(a)(1)(B), and if so, whether or not Cox is entitled to a jury trial on this claim. Should the district court conclude that Cox is both entitled to relief under § 502(a)(1)(B) and to a jury trial on this claim, then the jury would decide all questions of fact pertaining to Cox's legal claim under § 502(a)(1)(B) as well as any issues of fact common to both § 502(a)(1)(B) and § 502(a)(3). *Curtis v. Loether*, 415 U.S. at 196 n.11; *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 470-473 (1962). It has been stated

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that "[w]hen a party has a right to a jury trial on an issue involved in a legal claim, the judge is of course bound by the jury's determination of that issue as it affects his disposition of an accompanying equitable claim." *Lincoln v. Board of Regents of the University System of Georgia*, 697 F.2d at 934. Thus, it is inappropriate at this time to examine the findings of fact by the district court because we are unable to tell whether the district court will reach any or all of the factual issues in dispute in this case.

V. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Cox next contends that it was error for the district judge to direct a verdict in favor of Keystone on Cox's claim for intentional infliction of emotional distress. Cox argues that there was sufficient evidence in the record to support a prima facie case and that the claim should therefore have been submitted to the jury. His claim for intentional infliction of emotional distress is a state tort claim and the substantive law of Pennsylvania governs. In a case such as this, where there is an appeal from a

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directed verdict for the defendant, "we must examine the record in the light most favorable to the plaintiff [Appellant] . . . [and] determine whether, as a matter of law, the record is critically deficient of the minimum quantum of evidence from which a jury might reasonably afford relief. *Denneny v. Siegel*, 407 F.2d 433, 439 (3d Cir. 1969).

The gravamen of the tort of intentional infliction of emotional distress is that the conduct complained of must be of an "extreme and outrageous type." *Rinehimer v. Luzerne County Community College*, 372 Pa. Super. at ___, 539 A.2d at 1305. As a preliminary matter, it is for the court to determine if the defendant's conduct is so extreme as to permit recovery. Krushinski v. Roadway Express, 627 F.Supp. 934, 938 (M.D.Pa. 1985) (citing Restatement (Second) of Torts § 46 comment h). [13]

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[13] Comment h to the Restatement (Second) of Torts states in pertinent part: "It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, or whether it is necessarily so."

Pennsylvania courts have been chary to declare conduct "outrageous" so as to permit recovery for intentional infliction of emotional distress and have allowed recovery "only in limited circumstances where the conduct has been clearly outrageous." Krushinski v. Roadway Express, 627 F.Supp. at 938. It has been said that "[t]he conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." [14] Buczek v. First National Bank of Mifflintown, 366 Pa.Super. at _____, 531 A.2d at 1255.

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[14] Cox likens this standard to the conduct acquired for an award of punitive damages. This analogy is faulty and has been explicitly rejected by the Pennsylvania courts. One court, quoting comment h of section 46 to the Restatement Second of Torts, noted: "The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. It has not been enough that the defendant has acted with intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice', or a degree of aggravation that would entitle the plaintiff to punitive damages for another tort." *Daughten v. Fox*, 372 Pa.Super. 405, ____, 539 A.2d 858, 861 (1988).

We must view the evidence in the light most favorable to Cox to determine if Keystone's conduct can be termed outrageous. We may therefore accept as true Cox's characterization of the evidence for the limited purpose of ruling on the propriety of the directed verdict. Keystone knew that Cox had undergone triple by-pass surgery, and was returning to work on a trial basis and that accordingly his physical and emotional recuperation were not complete when Keystone fired him. Keystone may be said to have known that by firing Cox, it was endangering his chances of collecting medical and disability benefits. Keystone may also be said to have known that by firing Cox it was depriving him of a valuable therapeutic tool and jeopardizing his chances to obtain alternate employment.

At the outset, it must be recognized that it is extremely rare to find conduct in the employment context that will rise to the level of outrageousness necessary to provide a basis for recovery for the tort of intentional

infliction of emotional distress. Rinehimer v. Luzerne County Community College, 372 Pa.Super. at ____, 539 A.2d at 1305. In the context of a dismissal, it has been noted that "while loss of employment is unfortunate and unquestionably causes hardship, often severe, it is a common event" and cannot provide a basis for recovery for intentional infliction of emotional distress. Brieck v. Harbison-Walker Refractories, 624 F.Supp. 363, 367 (W.D.Pa. 1985), aff'd. in relevant part 822 F.2d 52 (3d Cir. 1987). Moreover, courts applying Pennsylvania law have failed to find conduct outrageous where an employer deceived an employee into foregoing other employment, Cautilli v. GAF Corp., 531 F.Supp. 71, 74 (E.D. Pa. 1982), or even where the employer engaged in a premeditated plan to force an employee to resign by making employment conditions more difficult. Madreperla v. Willard Co., 606 F.Supp. 874, 880 (E.D. Pa. 1985).

Indeed, the only instances in which courts applying Pennsylvania law have found conduct outrageous in the

employment context is where an employer engaged in both sexual harassment and other retaliatory behavior against an employee. See, e.g., Bowersox v. P.H. Glatfelter Co., 677 F.Supp. 307, 311 (M.D.Pa. 1988). [15] In *Bowersox*, the plaintiff alleged that her employer not only sexually harassed her but withheld information from her which she needed to perform her job, forbade her from talking to anyone in her office, prohibited her from answering the phone, refused to talk to her and followed her throughout the plant. *Id.*

In the instant case, examining Cox's claim in the light most favorable to him, Keystone can only be said to have dismissed Cox with an improper motive and notwithstanding the potential effects on Cox, Keystone's

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[15] In *Bowersox*, the court noted: "If the only allegations supporting Joanne Bowersox's claim for intentional infliction of emotional distress were those concerning Young's sexual harassment of her, the court would be forced to conclude that Count Three [the intentional infliction of emotional distress claim] failed to state a claim upon which relief could be granted." *Bowersox v. P.H. Glatfelter, Co.*, 677 F.Supp. at 311.

actions, examined with Pennsylvania precedent as the relevant backdrop, do not appear to rise to the level of outrageousness which is required under Pennsylvania law. Thus, although we agree with the district court that Cox's dismissal could have been handled with more empathy and finesse, we must nevertheless conclude that Keystone's behavior was not so outrageous as to allow a reasonable jury to afford Cox relief on his intentional infliction of emotional distress claim. Thus, the district court properly directed a verdict in favor of Keystone on Cox's emotional distress claim.

VI. CONCLUSION

For the foregoing reasons we will affirm the district court's order denying Cox a jury trial on his claim under § 502(a)(3) of ERISA. We will also affirm the district court's order directing a verdict in favor of Keystone on Cox's intentional infliction of emotional distress claim.

We will remand this case to the district court for further consideration of Cox's entitlement to relief and to

a jury trial pursuant to § 502(a)(1)(B) of ERISA and for such other proceedings as may be necessary and consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court
of Appeals for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN H. COX,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 85-160 Erie
KEYSTONE CARBON COMPANY, RICHARD REUSCHER and WILLIAM REUSCHER,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

After careful consideration, and adopting the following portions of submitted briefs as a basis for our ruling in the above-captioned case, we conclude that this Court must grant the defendant a new trial and that that trial must be a non-jury trial.

Plaintiff brought this action under § 510 of the Employee Retirement Income Security Act (ERISA) 29 U.S.C.S. § 1140, alleging and seeking to prove that he was discharged in violation of § 510 of ERISA, which in

pertinent part reads as follows: "It shall be unlawful for any person to discharge . . . a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under . . . this title . . . . The provisions of Section 502 (29 USCS § 1132) shall be applicable in the enforcement of this section.

Plaintiff claims that as a direct and proximate result of the unlawful conduct of the defendant, he suffered such severe reversals in his physical and emotional condition as to make it impossible for him to be gainfully employed through to the date of trial, and by virtue thereof, impossible for him to ever under the circumstances regain comparable employment into the future.

Plaintiff sought at trial special and general compensatory damages as follows:

A. Special damages: (a) lost pay from date of discharge to date of judgment; and (b) out-of-pocket medical expenses incurred to date of judgment.

B. General damages: (a) diminished earning capacity and (b) pain and suffering.

Plaintiff also, citing his loss of pension accruals and ongoing life and medical insurance together with the failed attempts to replace same at any cost as a basis upon which to invoke ancillary equitable relief, requested the Court to require defendant to reinstate same.

This Court, overruling the defense motion to strike the demand for jury trial, permitted the cause to be tried to the jury, but limited the jury to a determination of liability and special damages (back pay and out-of-pocket medical expenses to date of judgment). The Court reserved to itself the prerogative to assess general damages and to reinstate the pension and medical and life insurance.

The jury with respect to special damages returned a verdict of $250,000.00 on which the Court entered judgment, together with post judgment interest. The

Court, however, denied award of general damages and the required equitable relief.

Both parties have filed post trial motions, Plaintiff, a Rule 52(b) motion seeking additional findings and amendment of judgment with respect to general damages and injunctive relief; and Defendant, motions for judgment n.o.v. or new trial.

We are now satisfied that this Court erred in failing to strike plaintiff's demand for a jury trial. There is no right to a trial by jury under § 502(a)(3) of ERISA (29 U.S.C.A. § 1132(a)(3)) for alleged violations of § 510 of ERISA (29 U.S.C.A. § 1140) since that section provides for very broad, make-whole, equitable relief. A plaintiff has no right to a jury trial where the statutory relief he seeks is equitable in nature. *Great Am. Fed. Sav. & Loan v. Novotny*, 442 U.S. 366, 375 (1979).

In our case, the enforcement provision under which plaintiff brought this action provides for equitable, and only equitable, relief. It states as follows: "a. A civil

action may be brought * * * (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations . . ." 29 U.S.C.A. § 1132(a)(3) (emphasis added). One very strong indication that no jury trial was intended under this section is the fact that no right to a jury trial is expressly granted therein. If Congress had intended the right to attach, it certain could have provided for it by so stating.

Secondly, in determining whether a statutory remedy is equitable or legal in nature, courts have scrutinized the language of the enforcement section at issue. Here, Congress has labeled the relief provided for as equitable. Furthermore, although an award under section 502(a)(3) may arguable include provisions for monetary relief (*e.g.*, back pay), this relief may still be characterized as equitable. A comparison of the Supreme Court cases

considering this issue under analogous statutes is instructive.

In *Lorillard v. Pons*, 434 U.S. 575 (1975), the Court decided that a plaintiff had the right to a jury trial under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C.A. § 621 *et seq.* There the plaintiff sued her former employer alleging that she had been discharged because of her age. She sought reinstatement, lost wages, liquidated damages, attorney's fees and costs, and she demanded a jury trial. The suit was brought pursuant to § 626 of the ADEA, which provides in pertinent part as follows: "Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter . . ." 29 U.S.C.A. § 626(c).

In deciding that a jury trial was proper, the Supreme Court emphasized that ADEA specifically provides for legal relief as well as equitable relief. *Lorillard* at 579. The Court noted that the word "legal" is a term of art -

where legal rights are determined, a right to jury trial attaches. Thus, the Court concluded: "We can infer, therefore, that by providing specifically for "legal" relief, Congress knew the significance of the term "legal," and intended that there would be a jury trial on demand to "enforc[e] . . . liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation." *Id.* at 583.

The Court in *Lorillard* also considered, of course, the nature of the relief provided. ADEA provides for relief including "judgments compelling employment, reinstatement or promotion" which, the Court acknowledged, are clearly equitable. *Id.*, n. 11. However, § 7(b) of ADEA also incorporates the Fair Labor Standards Act (FLSA), which states that "Amounts owing . . . as a result of a violation" are to be treated as "unpaid minimum wages or unpaid overtime compensation." 29 U.S.C.A. § 626(b) (West 1985) (incorporating 29 U.S.C. § 216 *et seq*. Thus, the Court reasoned, Congress must

have meant the phrase "legal relief" to refer to the remedies provided by the FLSA and incorporated into ADEA - judgments "enforcing . . . liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation.[16] *Id.* at 583, n. 11.

In contrast, the enforcement section of ERISA under which plaintiff brings his claim neither expressly mentions nor refers to any legal remedies. It is similar to the ADEA enforcement section, <u>without</u> the incorporated FLSA section. It does not even specifically note back pay, arguably a monetary award in the nature of "legal" relief, as a possible remedy. Indeed, § 502(i)(3) uses phraseology peculiar to equitable relief. It provides for (1) an injunction ("to enjoin any act or practice which violates any provisions of this subchapter"), or (2) other appropriate equitable relief. As the Court implied in

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[16]/ Under the ADEA and FLSA, the award of back pay to a prevailing plaintiff is the <u>usual</u> remedy, one expressly provided for in the statutes. Under ERISA, on the other hand, this sort of award is purely discretionary.

Lorillard, if Congress intended the right to jury trial, it could have expressly granted it or it could have specifically provided for "legal" relief. *Id.*, 580-84. As the Court pointed out, "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Id.* at 580 (citations omitted). In the instant case, then, it is certainly important to note that § 502 provides only for equitable relief, and that Congress has amended ERISA many times after the *Lorillard* decision, without inserting the term "legal" into the enforcement provisions at issue. Thus, even assuming that § 502 was intended to provide for an award of back pay, such an award would be equitable, not legal, in nature.

This conclusion squares with the cases decided under Title VII of the Civil Rights Acts of 1964. Title VII forbids employers to discriminate on the basis of race, color, religion, sex, or national origin. 42 U.S.C.A. §

2000e-2. Under the enforcement provision of that act, an employee may sue his employer for back pay, yet the circuit courts have consistently held that such a remedy is equitable, not legal, and therefore in those suits no right to a jury trial exists. *Great Am. Fed. Sav. & Loan v. Novotny*, 442 U.S. 366, 375 (1979); *Whiting v. Jackson State Univ.*, 616 F.2d 116 (5th Cir. 1980); *United States v. U.S. Steel Corp.*, 520 F.2d 1043 (5th Cir. 1975), *reh. denied*, 525 F.2d 1214, *cert. denied*, 429 U.S. 817 (1976). Under Title VII, "damages" in the form of back pay are restitutional in nature, and, since restitution is an equitable remedy, the right to a jury trial is not provided. *EEOC v. Brotherhood of Painters*, 384 F.Supp. 1264 (D.C.S.D. 1974).

A comparison of the language of these different statutes indicates that § 510 of ERISA is very similar to the enforcement section of Title VII. That section states, in pertinent part, as follows:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate.

42 U.S.C.A. § 2000e-5(g) (emphasis added). Thus, this section, like section 502 of ERISA, provides for (1) injunctive relief and (2) other appropriate equitable relief. The only difference is that this section expressly lists back pay and reinstatement as possible forms of relief. Because of such broad remedies which the court may administer in its discretion, courts have found that the relief is equitable in nature and therefore no right to a jury trial attaches; *a fortiori*, no such right exists under § 510 of ERISA.

The case of *Curtis v. Loether*, 415 U.S. 189 (1974), is further support for defendant's position that the failure to strike plaintiff's jury demand was improper. In *Curtis*, the

Court decided that a plaintiff had the right to a jury trial under Title XIII, known as the Fair Housing Act. That act generally prohibits discriminatory housing practices, and its enforcement provision simply provides for injunctive relief along with an award of "actual damages." 42 U.S.C.A. § 3612. The Court contrasted this language with the more elaborate language found in the enforcement section of Title VII. It concluded that the relief provided for under the Fair Housing Act - actual and punitive damages - is the traditional form of relief offered in the courts of law, whereas in Title VII cases the courts of appeals have characterized back pay as an integral part of an equitable remedy, a form of restitution. *Curtis*, 415 U.S. at 196-97.

In the instant case, then, there can be no doubt of the merit in characterizing the remedies provided by ERISA as "equitable" in nature. Equitable remedies traditionally come into play when legal remedies are inadequate. ERISA is designed to enhance sound

financial practices in the maintenance and administration of pension plans, and to guarantee, as a matter of equity and fair treatment, that employers do not abuse their traditional advantages in wielding plan assets. 29 U.S.C.A. § 1001. Prior to the enactment of ERISA, employee benefit rights (as between employer and employee) were primarily a matter of contract and, in the usual case, employees' contractual rights were not regarded as vested until actual retirement. Therefore, prior to ERISA, an employee had no recourse against his employer until actual retirement, which was often too late.

Section 510, therefore, fulfills the traditional purpose of equity by providing recourse where the law failed to do so. Until § 510 and the rest of ERISA was enacted, an employer could arbitrarily prohibit its workers from obtaining benefits. However, it certainly cannot be maintained that the remedies of § 510 were ones traditionally available in the courts of law. Indeed, only

recently have courts broadly interpreted that section and granted awards of back and front pay. These remedies, if ever they are to be permitted, are clearly make-whole, equitable remedies - judicial creations in the name of fairness.

And, of course, these are exactly the sort of broad remedies which plaintiff has requested in his complaint, in this employer/employee suit, plaintiff alleges that he has no adequate remedy at law (¶ 10), that the suit for a permanent injunction is the only means for securing adequate relief (*Id.*) and requests in his prayer for relief "reinstatement and damages for and including compensation, terms, conditions and privileges of employment, attorney's fees and for such other relief as the Court may deem just and equitable." Thus, the relief provided for under § 510, as well as the particular remedies sought thereunder, must be characterized as equitable.

Finally, this analysis is consistent with the prevailing and current decisional law on this issue which unquestionably denies the right to a jury trial. The circuit courts have uniformly held that there is no right to a trial by jury under ERISA. *Turner v. CF&I Steel Corp.*, 770 F.2d 43 (3d Cir. 1985), *cert. denied* 106 S.Ct. 00 (1986); *Katsaros v. Cody*, 744 F.2d 270 (2d Cir.), *cert. denied*, 469 U.S. 1072 1984); *Wardle v. Central States, Southeast and Southwest Area Pension Fund*, 627 F.2d 820 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981); *In Re Vorpahl*, 695 F.2d 318 (8th Cir. 1982); *Calamia v. Spivey*, 632 F.2d 1235 (5th Cir. 1980).

In *Calamia*, the Court of Appeals for the Fifth Circuit held that the mere fact that a plaintiff may receive a monetary award if he prevails in an ERISA action does not compel the conclusion that he is entitled to a jury trial. *Id*. at 1236-37. The court there specifically stated that ERISA does not entitle a plaintiff to a jury trial. *Id*. at 1237.

Similarly, in *Turner*, a suit was brought under subsection (a)(1)(B) of § 502 of ERISA. Although suits under that subsection are generally not categorized as equitable in nature, and even though substantial issues of fact had arisen in that case, the Court of Appeals for the Third Circuit affirmed the trial court's decision to deny plaintiffs' request for a jury trial.

Since the applicable statutory language of ERISA provides for only equitable remedies, this Court erred in entrusting to a jury the task of deciding a part of the relief sought by the plaintiff. We are of the view that this Court's error did result in prejudice to the defendant and that a new trial must be granted, a conclusion that makes moot all other post trial motions.

An appropriate order will be issued.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN H. COX, Plaintiff, v. KEYSTONE CARBON COMPANY, RICHARD REUSCHER and WILLIAM REUSCHER, Defendants.	))))))))))	Civil Action No. 85-160 Erie

ORDER

AND NOW, this 4th day of December, 1987, for the reasons set forth in the accompanying Memorandum Opinion,

IT IS HEREBY ORDERED that:

(1) Defendants' Motion for a New Trial is GRANTED and the above-captioned case is returned to the trial list for a non-jury trial at a time and place to be set by further order of this Court; and

(2) that all post-trial Motions filed by Plaintiff and Defendants are DENIED as MOOT.

/s/Glenn E. Mencer
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN H. COX, Plaintiff, v. KEYSTONE CARBON COMPANY, RICHARD REUSCHER and WILLIAM REUSCHER, Defendants.	)	Civil Action No. 85-160 Erie

ORDER

AND NOW, this 6th day of January, 1988, the parties in the above-captioned case, by their respective attorneys, having filed a stipulation and motion of record on December 31, 1987 moving this Court to dispense with further evidentiary proceedings and to proceed directly with the disposition of the case,

IT IS HEREBY ORDERED that:

(1) the parties' motion that the Court proceed directly to dispense of the above-captioned case is GRANTED;

(2) the parties, by their respective attorneys, shall file proposed Findings of Fact and Conclusions of Law on or before February 1, 1988; and

(3) if the parties desire to file briefs setting forth their legal contentions, such briefs shall be filed on or before February 15, 1988.

/s/Glenn E. Mencer
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN H. COX, Plaintiff, v. KEYSTONE CARBON COMPANY, RICHARD REUSCHER and WILLIAM REUSCHER, Defendants.	Civil Action No. 85-160 Erie

ORDER

AND NOW, this 2nd day of March, 1988, for the reasons set forth in the accompanying Adjudication,

IT IS HEREBY ORDERED that JUDGMENT is entered in favor of the defendant, Keystone Carbon Company, and against the plaintiff, John H. Cox.

/s/ ______________________________
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN H. COX,	)	
	)	
Plaintiff,	)	Civil Action
	)	
v.	)	
	)	No. 85-160 Erie
KEYSTONE CARBON COMPANY,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

By its opinion of November 9, 1988, the United States Court of Appeals for the Third Circuit affirmed this Court's holding finding for Keystone and denying Cox a jury trial under Section 502(a)(3) [17] of ERISA, 29 U.S.C. § 1132(a)(3), and remanded this case to this Court to determine whether Cox has presented a claim under

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[17]/ Section 502(a)(3) provides that a civil action may be brought "by a participant, beneficiary or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other equitable relief."

Section 502(a)(1)(B), 29 U.S.C. 1132(a)(1)(B), and if so, whether Cox was entitled to a jury trial. The court stated:

> Even though Cox is not entitled to a jury trial under § 502(a)(3), our analysis is not over because he may still be entitled to a jury trial if his claim for relief under § 502(a)(1)(B) is legal in nature . . . It is established law in this circuit that the substance of the pleadings must be examined to determine if the issues raised are triable to a jury. *Laskaris v. Thornburgh*, 733 F.2d 260, 264 (3d Cir.) *cert. denied*, 469 U.S. 886 (1984).

Cox v. Keystone Carbon Company, 861 F.2d 390, 394 (3d Cir. 1988).

Plaintiff brought this suit under Section 510 of ERISA which provides that the provisions of § 1132 shall be applicable in the enforcement of this section. Under Section 502(a)(1)(b) a civil action may be brought by a participant or beneficiary "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights for future benefits under the terms of the plan."

Thus, we must analyze Cox's complaint to determine whether Cox has brought a claim under Section 502(a)(1)(B). In paragraph one of Cox's complaint Cox seeks:

> a permanent injunction restraining Defendant from discharging or otherwise discriminating against Plaintiff for the purpose of interfering with Plaintiff's attainment of rights and benefits to which Plaintiff is entitled and may become entitled under Defendant's employee benefit plans and for damages against Defendant, including compensation, and benefits due Plaintiff under Defendant's various employee benefit plans, for reinstatement and back pay, attorney's fees and for such other relief as this Court may deem just and equitable.

We find that the plaintiff's complaint seeks a permanent injunction and seeks benefits due to Cox under Keystone's various employee benefit plans. Accordingly, we conclude, in disagreement with Keystone's position that a Section 502(a)(1)(B) claim cannot be founded upon a violation of Section 510, that Cox has submitted a claim for benefits under Section 502(a)(1)(b) contiguous with his Section 510 claim.

Keystone asserts that there is no right to jury trial in an action under Section 502(a)(1)(B). We disagree. The Third Circuit found in this case that the Seventh Amendment provides for a jury trial in limited circumstances under ERISA. The Third Circuit stated:

> In determining a party's right to a jury trial it is the procedural and remedial sections of the statute creating the right which must be examined. *See, Tull v. United States*, 481 U.S. 412, 107 S.Ct. 1831 (1987); *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). Where the particular remedial section in the statute provides for only equitable remedies than no right to a jury trial exists. *Lincoln v. Board of Regents of University System of Georgia*, 697 F.2d 928, 934 (11th Cir.) *cert. denied*, 464 U.S. 826 (1983) *citing Lehman v. Nakshian*, 453 U.S. 156, 163-164 (1981). As one learned commentator has pointed out, within a particular statute a right to a jury might exist as to some of the enforcement sections and not as to others. (*See* note 4) 5 J. Moore, *Federal Practice* § 38-11[7] 1988 . . . If the statutory analysis does not reveal a congressional intent to provide a jury trial, the seventh amendment to the United States Constitution must be examined to determine if it commands that a jury trial be provided.

Cox, 861 F.2d at 392-393.

However, in *Turner v. CF&I Steel Corp.*, 770 F.2d 43, 46 (3d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986), the court held:

> Suits brought under subsection (a)(1)(B) are not categorized as equitable as are those under subsection (a)(3). A survey of the case law, however, reveals that most cases brought under subsection (a)(1)(B) do not involve disputed factual matters. Most often the question is whether the trustees or plan administrators properly exercised discretion in denying or setting the level of benefits . . . The nature of most controversies under subsection (a)(1)(B), therefore, does not lend itself comfortably to the traditional jury trial . . . We therefore find ourselves in agreement with the other Courts of Appeals which have held that no jury trial is required in suits under § 502(a)(1)(B) by a beneficiary or participant against a trustee.

Id. 770 F.2d at 46-47.

In *Pane v. RCA Corporation*, C.A. No. 88-5758 (Feb. 28, 1989) the Third Circuit reconfirmed its holding in *Turner*. The court held:

> Those causes of action authorized by section 502(a)(1)(B) are not explicitly denominated as equitable. In *Turner v. C.F.&I Steel Corp.*, 770 F.2d 43, 48 (3d Cir. 1985), however, we held that the section 502(a)(1)(B) cause of action for the recovery of benefits was equitable in nature

> . . . Pane urges that these authorities, *Turner* especially, are distinguishable because in this instance his claim is against his employer and not against a separate trust fund. In fact, however, the *Turner* suit was against an employer for benefits in excess of those provided by a funded plan. Thus the *Turner* suit, like this one, sought to impose liability on an employer, not simply a separate fund. Thus *Turner* is directly on point and controlling.

Therefore, we conclude that in this case seeking benefits under section 502(a)(1)(B) Cox did not have a right to a jury trial. Accordingly, the judgment of this Court granting judgment in favor of the defendant shall stand.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN H. COX,	)	
Plaintiff,	)	Civil Action
v.	)	
	)	No. 85-160 Erie
KEYSTONE CARBON	)	
COMPANY,	)	
Defendant.	)	

ORDER

AND NOW, this day 1st of June, 1989, this case having been remanded to this Court for further consideration, for the reasons set forth in the accompanying Memorandum Opinion, we conclude that although the plaintiff has asserted a claim under section 502(a)(1)(B), there is no right to jury trial in this case.

IT IS HEREBY ORDERED that no jury trial is required under this section 502(a)(1)(B) claim and, therefore, the previous order of this Court granting judgment in favor of the Defendant, Keystone Carbon Company, and against the Plaintiff, John B. Cox shall stand.

/s/ Glenn E. Mencer
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-3404

JOHN H. COX, Appellant

v.

KEYSTONE CARBON COMPANY,
RICHARD REUSCHER and WILLIAM REUSCHER

Keystone Carbon Company, Appellee

(D.C. Civil No. 85-00160 E)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA (ERIE)

Present: SLOVITER, HUTCHINSON, and COWEN, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was submitted pursuant to Third Circuit Rule 12(6) January 22, 1990.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered June 6, 1989, be, and the same is

hereby affirmed. Costs taxed against the appellant. All of the above in accordance with the opinion of this Court.

Attest:

/s/

Clerk

January 22, 1990

Certified as a true copy and issued
in lieu of a formal mandate
on February 22, 1990.

Teste:

/s/

Chief Deputy Clerk, U.S. Court of
Appeals for the Third Circuit